

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

WAYNE LAFOUNTAIN #171248,

Plaintiff,

CASE NO. 1:10cv943

v.

HON. ROBERT J. JONKER

SHIRLEE HARRY, et al.,

Defendant(s).

_____ /

**ORDER APPROVING AND ADOPTING
REPORT AND RECOMMENDATION**

This is a prisoner civil rights action alleging unconstitutional retaliatory actions by Defendants. Defendants moved for summary judgment, and Plaintiff opposed the motion arguing, among other things, that he needed additional discovery opportunity. The Magistrate Judge recommends denying the motion for summary judgment, without prejudice, and granting Plaintiff the opportunity for certain additional discovery (docket # 68). Both sides object to the Report and Recommendation (docket ## 69-70).¹

Under the Federal Rules of Civil Procedure, where, as here, a party has objected to portions of a Report and Recommendation, “[t]he district judge . . . has a duty to reject the magistrate judge’s recommendation unless, on de novo reconsideration, he or she finds it justified.” 12 WRIGHT,

¹The motions before the Court could be considered not dispositive and the actions of the Magistrate Judge reviewed under the clearly erroneous standard of 28 U.S.C. § 636(b)(1)(A). Instead, the Court reviews the record de novo under the standard for dispositive motions in Fed. R. Civ. P. 72(b).

MILLER, & MARCUS, FEDERAL PRACTICE AND PROCEDURE § 3070.2, at 381 (2d ed. 1997).

Specifically, the Rules provide that:

The district judge to whom the case is assigned shall make a de novo determination upon the record, or after additional evidence, of any portion of the magistrate judge's disposition to which specific written objection has been made in accordance with this rule. The district judge may accept, reject, or modify the recommended decision, receive further evidence, or recommit the matter to the magistrate judge with instructions.

FED R. CIV. P. 72(b). De novo review in these circumstances requires at least a review of the evidence before the Magistrate Judge. *Hill v. Duriron Co.*, 656 F.2d 1208, 1215 (6th Cir. 1981).

The Court has reviewed de novo the claims and evidence presented to the Magistrate Judge; the Report and Recommendation (“R & R”) itself; and objections from the Plaintiff and Defendants. The Court finds the R & R factually sound and legally correct, and therefore adopts the R & R. Plaintiff’s only objection is to the portion of the R & R denying marshal service of subpoenas on the party witnesses, but as the R & R notes, Plaintiff has plenty of discovery options against party witnesses short of marshal-served subpoenas. Defendants object that there is no need for a new discovery period, but the Court agrees with the Magistrate Judge that Plaintiff has articulated a legitimate basis for the opportunity to seek additional discovery.

ACCORDINGLY, IT IS ORDERED that the Report and Recommendation of the Magistrate Judge (docket # 68) is approved and adopted as the opinion of the Court.

IT IS FURTHER ORDERED that Plaintiff’s motion to defer summary judgment proceedings (docket # 59) is **GRANTED**, and Defendants’ motion for summary judgment (docket # 57) is **DENIED** without prejudice.

IT IS FURTHER ORDERED that Plaintiff's motion for leave to file an enlarged brief in response to defendants' motion for summary judgment (docket # 64) is **DENIED** and Plaintiff's motion for substitute service (docket # 53) is **GRANTED** only as to the subpoena addressed to non-party MDOC Director Heyns, but **DENIED** in all other respects. The Clerk's Office is directed to re-issue the subpoena and forward it to the United States Marshals Service for service under 28 U.S.C. § 1915(d).

IT IS FURTHER ORDERED that Plaintiff's motion for an amended case management order (docket # 63) is **GRANTED**, and the Magistrate Judge is instructed to prepare one consistent with this ruling.

Dated: September 30, 2015

/s/ Robert J. Jonker
ROBERT J. JONKER
CHIEF UNITED STATES DISTRICT JUDGE